No. 14,324

IN THE

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

Honorable Dal M. Lemmon, Judge.

BRIEF OF APPELLEE.

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STATEMENT AS TO JURISDICTION.

Appellants' statement as to jurisdiction set forth at pages 1 and 2 of its brief herein is true and correct,

and appellee does hereby adopt and approve said statement.

ARGUMENT.

I. THE TRIAL COURT CORRECTLY FOUND THAT THE CENTRIFUGE IN QUESTION WAS RETURNED BY APPELLANTS TO APPELLEE UPON THE EXPRESS CONDITION AND AGREEMENT OF THE APPELLANTS TO PAY TO THE APPELLEE THE SUM OF $3,386.25.

The complaint alleges (TR 5), and the District Court found (TR 13-14), that the appellants purchased from appellee two machines known as Sharples Super-D-Canter Centrifuges, for the agreed price of $13,545.00 each; that thereafter appellants offered to return one of these machines to the appellee and the appellee agreed to accept the return of this machine upon the payment by the appellants to the appellee of the sum of $3,386.25; that the appellants returned the machine to appellee and agreed to pay the sum of $3,386.25 to the appellee.

The appellants do not challenge the finding of the Court to the original contract of sale from the appellee to the appellants. That transaction was completed, and on February 22, 1952, the date that the appellants offered to return the machine to the appellee (TR 36), title to the machine was in the appellants. Parenthetically, it may be noted, that the defense of warranty raised by the appellants in their complaint, was found against them by the District Court (Findings VI, VII and VIII; TR 15-16), and has not been made an issue on this appeal by the appellants.

The appellants' position, however, appears to be that they did not obligate themselves on a second contract for the return of the machine to the appellee when in April of 1952 they chose to return the machine to the appellee. A brief consideration of the facts as shown by the correspondence set forth in the record should suffice to dispose of this contention.

As we have seen, the appellants in their letter dated February 22, 1952, and addressed to the president of appellee (plaintiff's Ex. No. 6; TR 36-38) asked permission to return this machine to the appellee.

The appellee replied on March 5, 1952 (Plaintiff's Ex. No. 7, TR 38-39), stating:

> "We will accept the return of the last Super-D-Canter which we shipped to you, if this machine has not been used, and at a cancellation charge of 25% of the price of the machine.
> * * * * * * *
> Upon receipt of your firm order, we proceeded to manufacture this unit, and we experienced irrecoverable costs. It is our expectation that you will reimburse us for these costs, and this is the basis of the cancellation charge of 25%. . . ." (TR 38-39).

To this point the appellants are correct in their assumption that no contract had arisen. The appellee's reply of March 5, 1952 constituted an offer setting forth the terms and conditions under which the appellee would accept the return of the machine. On March 14, 1952, the appellants responded:

> "In response to your letter of March 5th, we wish to advise that we will keep a direct answer in abeyance pending an exchange of correspondence between our respective offices.
>
> You can expect to hear from us within a short time. . . ." (Plaintiff's Exhibit No. 8, TR 40).

The further correspondence to which appellants refer was not forthcoming, and on April 7, 1952, appellee wrote the appellants requesting payment of the original purchase price for the machine (Plaintiff's Ex. No. 9, TR 41).

On April 14, 1952, the appellants replied to this last letter in the following manner:

> "Your letter of April 7 addressed to our Carbondale address has been sent directly to us for our attention.
>
> By now you have probably received the return of the PY-14 Super-D-Canter. Perhaps this will answer your question as to why you have not received our check to offset the charges which you questioned in your letter. . . ." (Plaintiff's Ex. No. 10, Tr. 42).

As shown by Defendants Exhibit D (TR 46-47) the machine in question arrived at the appellee's plant in Philadelphia on April 16, 1952.

In the face of these undisputed facts, the appellant's contention that the District Court's finding of a contract for the return of the machine is not supported by the evidence, is untenable. It is, of course, true that where an offer or counter-offer is made, con-

templating a bilateral contract, there must be an expression or communication of acceptance in order to constitute a contract, but it is not true that the acceptance of an offer or counter-offer must in all cases consist of a verbal declaration by the offeree. On the contrary, the acceptance may be manifested by the performance by the offeree of the exact thing called for by the offer or counter-offer (Calif. Civil Code Sec. 1584; 135 A.L.R. 826).

> "An acceptance without objection or condition constitutes a binding contract when communicated to the offeror, and is usually made by express declaration or by unequivocal acts, as by signing the contract. Under certain circumstances, however, acceptance can be inferred from conduct on the offeree's part. Similarly, where an acceptance is qualified or varies the terms of an offer, constituting in effect a counter-offer, the terms of such counter-offer may be accepted by the original offeror by acts from which acceptance may be implied.
>
> * * * * * * *
>
> Conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the offeree, for it is a settled principle that the undisclosed intentions of the parties to a contract, in the absence of fraud, mistake, and the like, are immaterial, and the outward manifestation or expression of assent is controlling."
>
> 12 *Cal. Jur.* 2d 212-213.

See also:

Wood v. Gunther, 89 C.A. (2d) 718, 729.

It therefore follows that when the appellants undertook to ship the centrifuge, which they had previously purchased from appellee, to the appellee at its Philadelphia plant, that unqualified act constituted an acceptance in the view of the law of the terms and conditions set forth in the appellee's letter of March 5, 1952 (Plaintiff's Ex. No. 7).

Since title to the machine was in the appellants and since they admittedly knew of the terms upon which appellee conditioned its offer to take back the machine, they bound themselves to those terms and conditions when they undertook to return it.

II. DAMAGES WERE PROPERLY ASSESSED BY THE DISTRICT COURT BASED UPON THE CONTRACT FOR THE RETURN OF THE CENTRIFUGE.

In sections I and II of their brief appellants dispute the measure of damages applied by the District Court. In so doing, they misconstrue the nature of the cause of action alleged in the complaint and upon which the District Court based its judgment.

As we have seen, the evidence establishes and the trial Court found that when the appellants took it upon themselves to return the centrifuge in question to the appellee they thereby accepted the terms and conditions of the appellee's counter-offer and, by their act, agreed to pay the cancellation charge of 25 per cent of the purchase price. This contract furnishes

the measure of damages. *Union Liquors v. Finkel & Lasarow,* 44 C.A. (2d) 706, 710.

It must be borne in mind that, at the time the machine was returned, in law and in fact, title to the machine was, as found by the District Court, in the appellants. The initial contract of sale was at that time completed. The machine had been delivered to the appellants and the appellants were indebted to appellee on the contract of sale for the purchase price of the machine.

While the appellants speak of an "attempted rescission", no rescission has been shown, and they point to no part of the record which would sustain a rescission.

In appellants' opening brief (p. 6) the statement appears:

> "The Sharples Super-D-Canter is a standard article catalogued for sale by the plaintiff (TR p. 123, line 8)"

The reference is to a section of the reporter's transcript which was not designated as part of the printed record on appeal and hence, not proper for consideration on appeal. *Moses v. Hazen,* 69 F. 2d 842, 98 A.L.R. 386; *Rosborough v. Chelan County,* (C.C.A. 9) 53 F. 2d 198, 200. However, suffice it to say, that the record properly before this Court clearly shows that the machine in question was especially manufactured to the order and specifications of the appellants, and was not a stock item. We refer the Court to the following from Plaintiff's Exhibit No. 4, a letter

from appellee's president to appellants, dated November 21, 1951:

> "We require a minimum of seven months to build Super-D-Canters with hard surfaced conveyors . . ." (TR 31)

and from Plaintiff's Exhibit No. 11, a letter from appellee to appellants dated April 23, 1952:

> "Once again I want to point out that we proceeded to manufacture this unit upon the basis of an order received from you, and we experienced costs which are irrecoverable. There is no indication, nor have you given us any definite data which would support your statement that this equipment failed to perform satisfactorily. In the first place, our laboratory guaranteed nothing except to duplicate the performance obtained here in the laboratory when operating on the same material. Since this machine is a duplicate of the laboratory machine, there is just no doubt in my mind that it will produce the same performance." (TR 43-44).

III. NO QUESTION OF A PENALTY IS INVOLVED IN THIS APPEAL, EITHER IN FACT OR IN LAW.

In section IV of their opening brief (pp. 12 et seq.), appellants seek to argue that the cancellation charge was "a penalty under the guise of liquidated damages."

We might dispense with this contention by the observation that it is not included in appellants'

statement of points on which they intend to reply upon appeal.

But in any event the appellants once more misconstrue the basis of their liability. As alleged in appellee's complaint and as found by the District Court, appellants agreed to pay the cancellation charge when, by their unqualified act in returning the centrifuge to appellee, they accepted the appellee's offer to take back the machine upon the payment by appellants of the cancellation charge.

Without the necessity of referring the Court to any portions of the record not designated on this appeal, the exhibits designated as part of this record clearly and sufficiently show that the cancellation charge was based upon the irrecoverable costs incurred by appellee in the manufacture of this item to the order and specifications of the appellants.

Wherefore, it is respectfully submitted that the judgment herein should be affirmed.

Dated, San Francisco, California,
April 8, 1955.

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